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No. 81-1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE NASH COUNTY BOARD OF EDUCATION,

PETITIONER,

versus

THE BILTMORE COMPANY; BORDEN, INC.; COBLE DAIRY PRODUCTS COOPERATIVE, INC.; PET, INC.; AND FLAV-O-RICH, INC., FOR ITSELF AND AS SUCCESSOR IN INTEREST OF UNITED DAIRIES, INC.,

RESPONDENTS.

REPLY TO "SUPPLEMENTAL BRIEF" OF THE RESPONDENTS

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REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF

This Reply Brief is submitted pursuant to Rule 22.6 because Respondents, by taking statements out of context, have cast doubt upon the statements regarding the record which were set forth in the amicus brief for the State of North Carolina.

On pages 4 and 5 of Respondents' Supplemental Brief, the Respondents take out of context certain questions and answers which materially misinterpret the testimony of Deputy Attorney General Jean Benoy.

In order that the Court may have the real meaning of this testimony we will quote the testimony immediately preceding the questions and answers quoted by Respondents, then quote the questions and answers quoted by Respondents underlined, and then quote the testimony immediately following the questions and answers quoted by Respondents.

On pages 145, 146 and 147 of Volume II of

the Benoy deposition is found the following language:

"Q. I said if you had pressed the complaint filed in 1974 and proceded to a trial in the case, would you have sought damages in the event of a judgment that a conspiracy existed which damages would have represented the injury that you alleged was suffered by school systems in the State of North Carolina involving the sale of milk by dairy processors in this State?

A. Assuming that the court had established a class under Rule 23 and given notice and they had not all opted out and were present in the suit, I certainly would have, but that was not a decision that would be left up to me as to whether to press it or not, you see. Something had to happen subsequent to filing of the complaint alleging the damages here, which was the establishment by the court of a class and notice given and them having an opportunity to come forward. I am sure you know that you cannot claim damages on behalf of a class member who has excluded himself from the class and is not present representing his claim.

BY MR. DUESENBERG:

Q. What was the authority under which you brought this lawsuit?

A. G.S. Chapter 75 and Chapter 114-2.

Q. And is Chapter 114 the section of code of the state that pertains to the authority of the Attorney General's--

A. The duty of the Attorney General, yes. Chapter 75 says, I believe it is 75-14 or 15, somewhere there, the duty of the Attorney General to prosecute actions by the state. 75-16 says, gives the right of action for treble damage for violations of the terms of the chapter, so all of those were the authorizations to bring the action, bring the lawsuit.

Q. And they were the premise for your pursuing as a representative of the public school systems in this state?

A. Oh, yes. That is to bring the action.

Q. Is there any provision in the North Carolina--strike that please--was there any provision in Rule 23 of the North Carolina Rules of Civil Procedure concerning certification of a class in 1974?

A. No, there is not. Our Rule 23 is substantially identical to the old Rule 23 of the Federal Rules of Civil Procedure. It does not track the revised Rule 23 which provides for that, but the lead case under the old Federal Rule is Union Carbide versus Neesely, Neesely versus Union Carbide, I think that is reported under 300 Fed., Second, and Judge Murrah was the author of the opinion. It was a 2, 1 decision tried by Joe Aliola if you remember that case, and in that case the class action was permitted to proceed with a trial by jury and that was under the old Rule 23 of the Fed.'s Rule of Civil Procedure at that time which was substantially identical to ours."

In addressing the second point raised by Respondents as Point 2 of their brief and set forth on page 4, they say:

> "The State implies that there was a parole agreement among the parties to the state action giving the consent judgment a meaning different than its term expressed."

It is impossible to understand the basis of Respondents' statement when the basic position of Petitioner and of the State in this action is that there were no other terms that could be included in the consent judgment entered into between the Attorney General and the Respondents in the state action other than expressly stated in the consent judgment. We again reiterate that there is not a single reference in the pleadings in the State of North Carolina case nor in the consent judgment which even inferentially could be interpreted as including the local boards of education in either the lawsuit or the consent judgment <u>without previously establishing a class action under Rule 23, which was never done</u>.

Under Subsection 3 of Respondents' brief, they say:

> "The Attorney General asserts that the respondents 'considered the idea' of joining the local school boards as parties to the state court proceeding, but 'rejected' the idea."

Respondents further state:

> "This assertion has no support in the record, and the Attorney General does not cite any."

The true facts are that the Benoy deposition is replete with the statement that there was no possible way the local boards of education could be bound by the settlement unless either

1. A class was formed, or

2. They were given notice of the settlement and an opportunity to be heard.

The Court's attention is called to the following testimony contained in Benoy deposition of May 4, 1977, Volume I, at page 97:

> ". . .and in that conversation, he [Defendants' Attorney Boyce] said, what they want to do is foreclose all claims and he said how would you propose could we do that and I said I said I couldn't propose that we do that. But he said, but that is what

the defendants want. He said, and if we settle it and that would foreclose them all on the class action and I told him that I didn't see how that could be because we had not established a class and that if that is what he wanted, it seemed to me that that would defeat the purpose of all the confidentiality that he had been expressing concern about, the desire for confidentiality because I told him as I understood the methodology that is used for establishing a class, you have to move the court to establish a class. You have to give notice to the class. And that involves, as I understand the class action requirements of the rule and the case law, that would require a notice to them of any intended settlement.

Q. A notice to whom?

A. To the members of the class. It would give them an opportunity to opt out of the class or the settlement proposal. That it would allow them to appear with their, other individual class members could appear with their own lawyers who would not be bound by any of our discussions, and if the desire was to settle all claims of all alleged class members, that that would absolutely probably open the door to further litigation and would not accomplish the result that he wanted. And so I said, that would be, that is the problem with the class action.... At any rate, I was telling him before you can estop anybody, they got to be able to come into court. You know, have an opportunity to be heard. The, so I

told him, at any rate I said to dispose of this case, I should think that establishing a class would be the exact, I probably used the word 180° off course. I said if, if you want to argue or do anything else you could if you want to, you know, have a basis for trying to estop them later, arguably we could follow the U.S. Justice Department route by filing notice in the Superior Court of an intention to settle our action and give a, give notice to the alleged class members who might be affected and give a 30 day waiting period for them to come in and file any objections that they might have to our proposed settlement, and the agreed terms that we had; those were the only two methods that I knew by which our action of settlement might foreclose the class members of, if a class were ever established, that is you would have to establish the class, the other one would be to give them notice, an opportunity to come in and object to the settlement as it might affect their interest.

Q. And what was done in response to your suggestion?

A. Well, a period of time passed, it seems to me it was a short period of time and let's see, he indicated himself he was not that familiar with Rule 23 or the U.S. Justice Department procedure. He said he would contact his client. It seems he came back and told me that, in substance that the defendants did not want either the class action route or us filing a notice in the Superior Court. That, now that is my recollection of what was said and, right in

there you see, we had agreed at least in principle that our costs would be paid to us and not filed in court and then he wanted to see a rough draft of what we were proposing in the way of a reporting system. And that was given to him.

The record further reflects that on the day of the signing of the consent judgment between Attorney General Edmisten and Mr. Dixon for Respondents, the following occurred:

> "And then we, just, when the Attorney General said, are you going to sign the judgment Benoy, I said no, it is prepared for your signature and he said, well, let's see it. And he said, well, now at that point in signing this we are not settling any claim except the State's, and, in substance, Mr. Dixon said that that was the chance that they were taking. Chance or risk or words to that effect. I don't remember the precise words spoken.
>
> Q. That who was taking?
>
> A. That the defendants would take that risk. That was, and he signed it and then there was another lawyer there."

Further in the record, is the deposition of Mr. Gordon Eugene Boyce, who was counsel for defendant Pine State Creamery, and who was the negotiator of the settlement for all of the

defendants. Mr. Boyce testified in a deposition in this action as follows:

"Q. All right. Now, Mr. Boyce, state whether or not during the settlement discussions a question was ever considered as to whether or not the defendants wanted to settle the claims of local boards of education, as well as the claims of the state?

A. There were discussions by me with at least Mr. Benoy, relating to the subject of the manner in which similar cases had been handled in the past. Those discussions did relate to such matters as to whether or not any consent judgment or any final judgment would have to be filed with the Court for some period of time to be held open for other parties, if any, to intervene. There were discussions relating to whether or not there would have to be a certain indication of the class; whether or not notices would have to be sent out, and we did discuss procedures along those lines.

Q. And state whether or not you also discussed whether or not the Judge would have to make a finding that a settlement was fair and reasonable to the class members, if it did in fact attempt to settle the claims of other members of the class.

A. I think it would be fair to say that Mr. Benoy discussed that with me. I did not discuss that with him, because there was not any part of my responsibilities to engage in any substantive discussions that I recall."

In Respondents' fourth item beginning on page 5 of their brief, Respondents seek acceptance of the proposition that the school boards were not entitled to legal, procedural and substantive due process of law because they were visited by some investigative officers and there was subsequent newspaper publicity. Surely this is not the law of the land.

Item 5 of the Respondents' Supplemental Brief, page 6, quarrels with the State's characterization of its action in the State court seeking injunctive relief as a parens patriae action. Respondents' contention here is that because such parens patriae allegations do not appear on the face of the State's Complaint in State Court the Attorney General is foreclosed from here asserting the nature of the State's action. Yet the Respondents quarrel with the State's assertion that the Attorney General "acted expressly and solely under the authority of G.S. §75-14-16. . . . which relates only to antiturst and consumer protection actions." The Complaint shows on

its face that G.S. §75-14 and G.S. §75-16 were the only authority asserted by the Attorney General in the State action, which paragraph reads as follows:

> "B. JURISDICTION AND VENUE
>
> 3. This is a civil antitrust action seeking permanent injunctive relief as provided for in G.S. §75-14 and money damages as provided for in G.S. 75-16, against each of the defendants, jointly and severally, as named in paragraph 2 above."

As to Item 6 of Respondents' Brief, Respondents quarrel with the Attorney General's assertion that the money damage it was seeking in the State action covered the State's "direct purchases of fluid milk from Respondents". The Respondents further state at pages 7 and 8 of their Supplemental Brief:

> "This is consistent with the fact that the extensive investigation by the State preceding the filing of this lawsuit related only to milk sales to local school districts."

and they refer to the deposition of SBI Agent Donald Jones.

The Court's attention is called to the Jones deposition, Volume I, at pages 6 and 7

as follows commencing at line 23 of page 6:

"We received a specific inquiry from an employee either in the Department of Public Instruction or School Food Service and the inquiry concerned the prices that the various school systems were receiving for milk.

Q. And approximately when was that?

A. To the best of my recollection it must have been in 1969. It could have been in early 1970 but it was when we were initially assigned to the Consumer Protection Division. I can't pinpoint the date better than that at this time. . ."

And on page 9 at line 21:

"Q. All right. You stated earlier that the Consumer Protection Division received a complaint from one of the employees of a dairy, will you tell us about that?

A. I believe that complaint was from a State employee who worked with the Department of Public Instruction or School Food Service Division."

and on page 30, Volume II dated June 7, 1977:

"Q. And from whom did you receive such complaints, if you can identify it?

A. The specific complaint that I recall concerning the price of milk was from as I said yesterday, from the Division of Public Instruction, or an employee of the School Food Service Division, and I believe that person's name was, or is, Donny Pollard."

and see Jones Deposition Volume II dated June 7, 1977, pages 30-34.

It is clear then that every statement made by the Attorney General in his amicus brief is correct and amply supported by the evidence of record.

Respondents attempt to convince this Court that when the State of North Carolina used the words or phrase "public school system" in its complaint it was describing "units of local government only". However, on pages 6 and 7 of Respondents' Brief, Respondents admit the State's Complaint clearly shows on its face that the Attorney General brought the action on the State's "own behalf as a direct purchaser of fluid milk from the defendants," and the record amply demonstrates that the initial complaint to the Attorney General was from a State official in a state department of public instruction.

CONCLUSION

Petitioner and the Attorney General of North Carolina respectfully submit to the Court that the record was correctly set forth in their respective briefs. They regret that Respondents' "Supplemental Brief" made necessary the filing of this reply. All the testimony when taken in context shows that there was never any question about the fact that the judgment bound only the state and that none of the local boards of education knew about, consented to or were bound by that judgment.

Respectfully submitted, this 3rd day of September, 1981.

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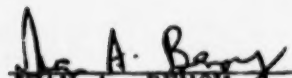

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Certificate of Service

This is to certify that the undersigned, a member of the bar of this Court, served this Reply to Supplemental Brief of the Respondents upon all of the parties to this action by depositing three copies of the Reply in the United States mail with first class postage prepaid addressed to the following counsel of record whose names at their post office addresses are as follows:

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